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11 XX GLOBAL, INC. and JACQUES WEBSTER

12 [Additional Counsel on Signature Page]

13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

15 PJAM LLC,  
16 Plaintiff,  
17 vs.  
18 XX GLOBAL, INC., JAQUES  
19 WEBSTER, and DOES 1-20, inclusive,  
20 Defendants.

CASE NO. 2:18-cv-03192 JFW  
(MRWx)

Hon. John F. Walter

**JOINT BRIEF RE ADDITIONAL  
JURY INSTRUCTION ON WAIVER**

21 XX GLOBAL, INC., JACQUES  
22 WEBSTER,  
23 Counterclaimants,

Trial Date: April 16, 2019

24 vs.  
25 PJAM LLC, JEFFERSON AGAR,  
26 ALEX MARTINI, PATRICK  
JOHNSTON, and ROES 1 through 10,  
inclusive,  
27 Counterclaim Defendants.

Action Commenced: March 20, 2018

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1 Defendants XX GLOBAL, INC. and JACQUES WEBSTER (together,  
2 “Defendants”), and Plaintiff PJAM LLC (“PJAM”) respectfully submit the  
3 following Joint Brief Re Additional Jury Instruction on Waiver, per the Court’s  
4 order at trial on April 16, 2019.

5 **Defendants’ Position**

6 The parties have stipulated to additional jury instructions on modification of a  
7 contract and the clear and convincing burden of proof. An updated set of jury  
8 instructions has been filed with the Court (ECF No. 85). Thus, the only issue the  
9 parties address herein is whether the jury should also be instructed on the law  
10 regarding waiver.

11 Defendants contend that the following instruction on waiver should be given  
12 to the jury. PJAM disagrees.

13 **CACI No. 336. Affirmative Defense—Waiver**

14 XX Global, Inc. and Jacques Webster claim that Mr. Webster did  
15 not have to perform at the Myth Live event at 11:45 p.m., as  
16 stated in the contract, because PJAM LLC gave up its right to  
17 have Mr. Webster perform at that time. This is called a “waiver.”  
18

19 To succeed, XX Global, Inc. and Jacques Webster must prove  
20 both of the following by clear and convincing evidence:

21 1. That PJAM LLC knew Mr. Webster was contractually  
22 required to perform at the Myth Live event at 11:45 p.m.; and  
23 2. That PJAM LLC freely and knowingly gave up its right  
24 to have Mr. Webster perform at that time.  
25

26 A waiver may be oral or written or may arise from conduct that  
27 shows that PJAM LLC gave up that right.  
28

If XX Global, Inc. and Jacques Webster prove that PJAM LLC gave up its right to have Mr. Webster perform at the Myth Live event at 11:45 p.m., then Mr. Webster was not required to perform at that time.

“In contract law, a waiver is defined as an intentional relinquishment of a known right, and it must ‘clearly be made to appear from the facts disclosed.’” *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 892 (Minn. 1982) (emphasis omitted) (citing *Kennedy v. Hasse*, 114 N.W.2d 82, 85 (Minn. 1962)). A waiver of a contractual right may be implied based on a party’s conduct after entering into the contract. *Kennedy*, 114 N.W.2d at 85 (affirming lower court’s finding of waiver based on defendant’s post-contract conduct).

Here, the evidence warrants instructing the jury on the law regarding waiver so that the jury may properly determine whether PJAM waived its purported contractual right to have Mr. Webster perform at the Myth Live event at 11:45 p.m. Alex Martini, the managing partner of PJAM, admitted during his deposition (1) that PJAM knew Mr. Webster had to be in Las Vegas by 1:00 a.m. on February 4, 2018, and thus he could not perform in Minnesota at 11:45 p.m. on February 3, 2018; and (2) that PJAM agreed with Defendants that Mr. Webster could perform at the Myth Live event as early as 10:00 p.m. Martini Dep. Tr. at 57:25-58:18. In fact, Mr. Martini admitted during his deposition that PJAM knew Mr. Webster could come to Minnesota for the event only “if he was assured he would be back in Las Vegas by 1:00 a.m. *Id.* at 60:5-9.

PJAM’s conduct, as demonstrated through exhibits admitted into evidence at trial, is entirely consistent with the parties agreeing that Mr. Webster would perform **not** at 11:45 p.m., as stated in the contract, but rather at or around 10:00 p.m. Trial Exhibit 50-5 confirms that PJAM was made aware of Mr. Webster’s travel requirements as early as January 25, 2018, ***before the contract was signed.*** Trial

1 Exhibit 29 similarly shows Jefferson Agar, another principal of PJAM, agreeing to a  
 2 “set time” of 10:30 p.m. Moreover, Mr. Stromberg confirmed during his testimony  
 3 at trial that the parties never intended for Mr. Webster to perform at 11:45 p.m.—a  
 4 time that was merely a “placeholder.” This further explains PJAM’s post-contract  
 5 efforts to figure out a mutually agreeable time for Mr. Webster’s performance. It  
 6 also explains why PJAM never pushed back when Mr. Stromberg repeatedly asked  
 7 for confirmation of travel arrangements based on Mr. Webster performing at or  
 8 around 10:00 p.m.

9 Defendants are not requesting a ruling that PJAM waived any right—that is an  
 10 issue the jury should decide. But, in order to do so, the jury must understand the  
 11 law. That is why this instruction is appropriate.

12 Defendants disagree with PJAM’s contention that Defendants waived their  
 13 right to assert this affirmative defense. Today—the first day of trial, after weeks of  
 14 meeting and conferring with PJAM’s counsel—is the first time that PJAM or its  
 15 counsel even suggested that Mr. Webster was contractually obligated to perform at  
 16 11:45 p.m. This new argument is nowhere to be found in any of the pre-trial filings,  
 17 including PJAM’s Memorandum of Contentions of Fact and Law (ECF No. 42).  
 18 There was no reason to assert this affirmative defense until Defendants’ counsel  
 19 became aware of its applicability, today at trial.

20 Defendants also disagree that the stipulated modification instruction  
 21 sufficiently addresses the Court’s concerns. Contract modification is a separate  
 22 issue from waiver. The jury could find that the parties modified the contract without  
 23 reaching the issue of waiver, or the jury could find that the contract was not  
 24 modified but PJAM waived its right to have Mr. Webster perform at 11:45 p.m.  
 25 through its conduct. The jury should be informed of all appropriate options for  
 26 applying the law to the facts; both instructions (modification and waiver) should  
 27 therefore be given.

28

1     **Plaintiff's Position**

2                 The court requested briefing on the issue of whether jury instructions should  
 3 be added on the issues of contract waiver and modification to avoid potential juror  
 4 confusion. The source of potential juror confusion is testimony regarding the  
 5 contract's integration clause and defendants' position that the contract was  
 6 modified.

7                 PJAM met and conferred with counsel for Defendants. PJAM stipulated to  
 8 Defendants' proposed jury instruction regarding contract modification, and the  
 9 related instruction concerning clear and convincing evidence. Those stipulated  
 10 instructions have been filed separately. PJAM objects to Defendants' request for a  
 11 Waiver instruction on the following grounds:

- 12                 (1) The modification instruction is sufficient to resolve any potential jury  
                        confusion. Defendants' evidence was that PJAM "agreed" to the modified  
                        travel schedule, not that compliance with the original travel schedule was  
                        waived. Mr. Stromberg, the only defense witness, testified that it was his  
                        understanding that Mr. Agar agreed to the modification by email, and  
                        Defendants' introduced Mr. Martini's deposition testimony regarding this  
                        alleged agreement.
- 19                 (2) The requested instruction is "CACI No. 336. Affirmative Defense—  
                        Waiver." Defendants waived their right to assert any affirmative  
                        defenses. Defendants did not raise any affirmative defenses in the Joint  
                        Pretrial Conference Order [Dkt. No. 45] or in their Memorandum of  
                        Contentions of Fact and Law [Dkt. No. 37], as required by Local Rule 16-4.1.  
                        For these reasons, PJAM requests that the court deny Defendants' request to  
                        add the requested waiver instruction.

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1 DATED: April 16, 2019

KING, HOLMES, PATERNO &  
SORIANO, LLP

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By: /s/ Howard E. King

HOWARD E. KING

MATTHEW J. CAVE

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DATED: April 16, 2019

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By: /s/ Stephen J. Tomasulo

STEPHEN J. TOMASULO

Attorneys for Plaintiff and Counterclaim  
Defendant PJAM LLC

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